Supreme Court, U.S.
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MICHAEL RODAK, JR., CLE

CASE NO. 80-596

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1980

CAROL O'DONNELL

Petitioner,

v.

STATE OF FLORIDA

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEALS, FOURTH DISTRICT, STATE OF FLORIDA

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QUESTION PRESENTED

I and II

WHETHER THE INITIAL STOP OF THE VEHICLE WHEREIN PETITIONER WAS AN OCCUPANT WAS VALID PURSUANT TO THE FOURTH AND FOURTEENTH AMENDMENT TO THE CONSTITUTION.

STATEMENT OF THE CASE

At approximately 9:40 p.m. on December 23, 1977, Chief Davis of the Parkland Police Department arrived at the scene of an arrest (R. 62). A beige van had been pulled over for driving through a stop sign (R. 26). The stop occurred 1 1/2 miles after the stop sign on a two lane dirt road with a ditch on one side and a canal on the other (R. 25-27). The canal is only two feet from the edge of the road and the swale starts at the road's edge (R. 25).

Chief Davis received a report from Sergeant Armold (R. 32,63). When Armold approached the van, after the stop, he observed burlap bales which, through prior experience, he knew contained marijuana (R. 28-31). Armold also detected the odor of marijuana

(R. 31). Armold saw approximately fifteen 100-pound bales (R. 31). He then placed one, Terry Brooks, the black driver of the beige van, under arrest (R. 27,31,34,37).

Sergeant Armold told Chief Davis of the large amount of marijuana in the van (R. 62). Armold also told Davis he believed another vehicle, an older model, dark blue of green Pontiac sedan had led the van into the city. (R. 35-37,63).

The city of Parkland has a population of 375 and it is 8 to 10 square miles in area (R. 34). Chief Davis testified he can recognize some 90% of the vehicles in Parkland (R. 63). There were no blacks in Parkland in December, 1977 (R. 38).

Approximately 10 to 15 minutes after

Chief Davis' arrival at the scene a northbound light blue Ford Van was spotted by Davis approximately 250 to 300 feet south of his position (R. 65, 70). Chief Davis, aware that a canal and a ditch flanked the road, observed the van run off the eastern edge of the roadway as it was travelling north (R. 66). The right hand wheels of the van hit the berm on the side of the road (R. 68). The berm is composed of dirt and sand six to eight inches high (R. 68). Chief Davis considered it dangerous for the wheels of a vehicle to run off on the berm since the vehicle could be pulled off the road causing a spill (R. 68). The van continued north at approximately 5 miles per hour and Chief Davis observed the vehicle run up on the berm just north of his location (R. 69). Davis did not

recognize the van, a late model, light blue Ford (R. 70). He noted that the occupants of the van were all paying attention to the cars on the side of the road even though police blue lights were not on, only emergency flashers were blinking. Davis also noted that none of the passengers were from Parkland (R. 70-78).

After observing the van leave the road the second time Chief Davis requested that Broward County Sheriff Deputy Villanueva stop the vehicle. Davis wanted to ascertain whether the driver was in a condition to operate the vehicle (R. 71). Deputy Villanueva, who had not taken particular note of the van until Chief Davis asked him to stop the vehicle, complied with the request (R. 7-9). The deputy requested

a driver's license of the driver (R. 9). The driver stated he had no license (R. 9). At that point Chief Davis approached the scene (R. 72). After learning that the driver had no license, Davis asked the occupants to exit the van. Through the opened driver's door Chief Davis saw bales and smelled the odor of marijuana (R. 73-75,76). Due to his nine years of experience as a police officer and prior contacts with similar bales Chief Davis believed the bales contained marijuana (R. 75-76).

Chief Davis testified he did not recognize any of the van's passengers as residents of Parkland when the van passed (R. 78). The dirt road on which the stop took place, 82nd Terrace is not a through road. It is all residential. There are no businesses or ware-

houses on the road (R. 81).

Deputy Villanueva testified Chief Davis told him the van was stopped because it was weaving (R. 11).

ARGUMENT

I and II

Quoting out of context from the trial court's order on her motion to suppress, Petitioner claims the trial court justified the stop in the case sub judice by the results of the plain view seizure which followed the stop. Petitioner also contends the trial court denied her motion to suppress erroneously in that specific articulable facts to justify the stop were not proven.

Petitioner's argument interprets the evidence in the light most favorable to her cause and shuns evidence and logical inferences which conflict with her defense theories. Petitioner's approach conflicts with well settled principles of appellate review. Factual findings must be sustained if there is substantial evidence to support

them, viewing the evidence in the light most favorable to the Government. Glasser v. United States, 315 U.S. 60, 80 (1942).

When viewed in context the trial court's order does not justify the seizure by its fruits. Rather the trial court, following precepts laid down by this Court in Delaware v. Prouse, 440 U.S. 748 (1979) and Terry v. Ohio, 392 U.S. 1 (1968), found that the search was reasonable after examining the circumstances surrounding the seizures.

As noted by this Court in Prouse at 659:

> The foremost method of enforcing traffic and vehicle safety regulations, it must be recalled, is acting upon observed violations.

Respondent submits that the officers in the case sub judice had reasonable grounds to stop the van wherein

Petitioner was riding to ascertain whether the driver was violating the laws of Florida by driving while intoxicated. The van was seen leaving the dirt road twice by a police officer (R. 63,68-69). The officer was aware that a ditch flanked the road on one side and that a canal was on the other side (R. 66). The wheels of the van hit a berm, composed of six to eight inches of dirt and sand (R. 68). The Officer considered it dangerous for the wheels of a vehicle to run off on the berm because the vehicle could be pulled off the road when the wheels on one side lost traction. The result would be a spill (R. 68). Despite the fact that the van was proceeding at approximately 5 miles per hour the van hit the berm twice (R. 68-69).

Given the hazards presented by the dirt road on which the van was proceeding and the difficulties the driver displayed by twice running off the road despite a very low speed, the police officers were fully justified in stopping the van to ascertain the condition of the driver.

See, Gustafson v. State, 243 So.2d 615 (Fla. 4DCA 1971) reversed on other grounds 258 So.2d 1 (Fla. 1972), affirmed 414 U.S. 260 (1973).

The trial court also found that the seizure of the blue van containing Petitioner was justifiable pursuant to "founded suspicion" of criminal activity.

The circumstances surrounding the seizure in the case sub judice were that a beige van loaded with marijuana

was stopped on a non-throughway dirt road at 9:00 p.m. in Parkland, a small community of 375 people. No blacks live in Parkland and the black driver of the vehicle was not recognized by the police. The beige van contained 1,500 pounds of marijuana (R 27, 31, 34, 37).

The police believed another vehicle, an older model, dark blue or green Pontiac sedan had guided the van through the area (R 35-37, 63). Shortly thereafter, a blue van, containing Petitioner, was spotted driving along the same dirt, non-through way road. The blue van approached the site of the stop at a very slow rate of speed, 5 miles per hour (R 69). The blue van and its occupants were not recognized by the police officers (R 70, 78)

even though the officers could recognize ninety per cent of the vehicles in Parkland (R 63). The blue van was travelling in the same direction as the first van (R 63, 65). The dirt, non-throughway road on which both vans travelled was a residential road with no businesses or warehouses on the road (R 81). The police noted that the occupants of the blue van were all paying attention to the cars on the side of the road,even though police blue lights were not on and only emergency flashers were blinking. Despite its slow rate of speed, 5 miles per hour, the blue van hit the berm on the side of the road twice (R 66, 69). In light of the 1,500 pounds of marijuana seized from the beige van and the prior sighting of

the dark blue or green Pontiac sedan which was apparently guiding the beige van through the area (R 63, 31), the police were justified in suspecting an organized group of marijuana distributors. The police was also justified in believing that vans were used by these marijuana distributors and that the dirt, non-through way, residential road on which the beige van was stopped was the route used. The police officers, who were capable of recognizing 90% of the vehicles in the community were aware that the blue van and beige van, which preceded it by a half hour, were not from the community. Given these circumstances the police acted reasonably when they stopped the blue van. See, Terry v. Ohio, supra.

Contrary to Petitioner's assertion, the blue van was not stopped merely because its driver and one of the two passengers were black. As discussed above, numerous factors existed which resulted in a finding of founded suspicion. While a racial or ethnic characteristic alone is not sufficient to justify a founded suspicion stop, United States v. Brignoni-Ponce, 422 U.S. 873, 885-886 (1975), such characteristic along with other factors assessed in light of the police officer's experience, can, and in the case sub judice did, amount to founded suspicion to justify the stop.

Unlike Brown v. Texas, 443 U.S. 47 (1979) where the defendant was stopped in an alley in an area with high incidence of crime on the basis that he

looked suspicious and that he had never been seen in the area before, the Petitioner's van was stopped on a residential dirt road at night after another van with 1,500 pounds of marijuana had been stopped. The driver of Petitioner's van fit the same description as that of the prior van. The actions taken by the occupants of Petitioner's van, i.e. driving at 5 miles per hour and displaying a great deal of curiosity concerning the prior van, gave rise to further suspicion. In sum, the circumstances surrounding the stop gave rise to founded suspicion and the stop was reasonable. See United States v. Harper, 617 F.2d 35, 40 (4th Cir. 1980).

CONCLUSION

In light of the foregoing Argument, Respondent respectfully requests that this Court deny the instant Petition for Writ of Certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished, by mail, to Jon H. Gutmacher, Esquire, Advocate Building, Suite 301, 315 S.E. Seventh Street, Fort Lauderdale, FL 33301, this 19th day of December, 1980.

Of Counsel